Alan F. Ciamporcero
Executive Director

Federal Regulatory Relations
1275 Pennsylvania Avenue, N.W. Suite 400
Washington, D.C. 20004
(202) 383-6416

PACIFIC TELESIS
Group-Washington

March 21, 1995

DOCKET FILE COPY ORIGINAL

William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton:

Re: *CC Docket No. 87-266, RM 8221*

On behalf of Pacific Telesis Group, Pacific Bell, and Nevada Bell, please find enclosed an original and six copies of their *"Comments"* in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Alan F. Ciamporcero

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58	CC Docket No. 87-266
and	
Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	RM-8221

DOCKET FILE COPY ORIGINAL

COMMENTS OF THE PACIFIC TELESIS GROUP, PACIFIC BELL AND NEVADA BELL

JAMES P. TUTHILL
LUCILLE M. MATES

140 New Montgomery Street, Rm. 1526
San Francisco, California 94105
(415) 542-7654

JAMES L. WURTZ

1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 383-6472

Attorneys for Pacific Telesis Group,
Pacific Bell and Nevada Bell

Date: March 21, 1995

Table of Contents

SUMMARY

The Commission developed the video dialtone common carrier model to permit telephone companies limited participation in the video marketplace given the prohibition of Section 553(b). That ban has been overturned by the courts, which recognize that the overbroad law violates local exchange carriers' (LECs) First Amendment rights. Regulations that would once again unreasonably interfere with LECs' First Amendment freedoms will suffer from the same constitutional defects as the cross-ownership ban unless the Commission can demonstrate through a most exacting record and analytic support that the kinds of major limitations proposed by the NPRM meet the level of scrutiny required to pass Constitutional muster.

Now, the Commission has an opportunity to further encourage the development of a viable video dialtone service. It can do so by adopting realistic regulations which will permit us to move forward with video dialtone offerings that will be in the public interest and which will accomplish the Commission's goals. Or, the Commission can reduce the value of the video dialtone common carriage model by adopting burdensome regulations that will disadvantage video dialtone in the competitive marketplace.

The video dialtone model clearly accommodates programming by video dialtone providers. Because of the open access characteristic of common carriage, a video dialtone system will not be transmuted into a cable system by the provision of affiliated programming. As a common carriage system, video dialtone should not be

subject to the provisions of the Cable Act. Title VI was not meant for common carriage systems. Some provisions are inconsistent, redundant or unnecessary in the video dialtone context. Burdening an emerging competitive service with both Title VI and Title II regulations would cause us to reevaluate our business plans with regards to entering the video business. Moreover, if Title VI regulation is imposed on the limited services which are within the Commission's jurisdiction, carriers will have little incentive to operate pursuant to the video dialtone model. Instead, carriers may reconsider providing services under the channel service model, which does not promote all of the goals intended by the Commission for video services.

We believe the Commission should conclude that our provision of programming should be treated as simply another nonregulated activity and that as such, affiliated programming activity will be subject to the existing effective competitive safeguards. Video programming is just another kind of nonregulated information for which the competitive safeguards have worked well. For example, the consumer benefits to joint marketing in the context of telephony and video transport services also apply when a carrier provides content. The same can be said for the CPNI rules, accounting safeguards and network disclosure safeguards.

Nor should there be new concerns about customer privacy when a carrier provides content. The Commission's previous determination that a customer's privacy interest was not harmed when a carrier provides transport is valid in this context also. The only new information that a carrier will have about consumers will be about the end users who specifically elect to buy the carrier's

programming. And, in offering a competitive service, carriers will not act in ways that would risk the loss of its customers. Our policies are carefully designed to protect our customer's information and to comply with existing federal and state laws.

Because video dialtone is an open access system, limitations on the extent of affiliated programming are not necessary. The Commission's rules currently prevent the monopolization of analog capacity by any programmer. Carriers should be permitted to provide affiliated programming to the extent there is unused analog capacity, with the proviso that the carrier will relinquish capacity in excess of the Commission's fifty percent limitation if necessary to meet future demand.

Finally, mandatory preferential treatment should be avoided because that imposes special burden on emerging competitive services. Carriers, however, should be authorized to offer preferential treatment, at their option, through their tariffs.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAR 2 1 1995

In the Matter of	
Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58	CC Docket No. 87-266
and	
Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	RM-8221

COMMENTS OF THE PACIFIC TELESIS GROUP, PACIFIC BELL AND NEVADA BELL

Pacific Telesis Group, Pacific Bell and Nevada Bell ("Pacific Companies") submit these comments on the Fourth Further Notice of Proposed Rulemaking ("Fourth NPRM") in the above captioned docket.[1]

[1] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry, 7 FCC Rcd 300 (1991)("First Report and Order"); Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992)("Second Report and Order"); Memorandum Opinion and Order on Reconsideration and Third Further Notice of proposed Rulemaking, 10 FCC Rcd 244(1994)("Reconsideration Order"); Fourth Further Notice of Proposed Rulemaking, FCC 95-20, Released January 20, 1995 ("Fourth NPRM").

As a result of the judicial decisions that the cable-telco cross ownership rule violates the First Amendment rights of telephone companies, the Commission inquires about the appropriate regulatory framework for local exchange carriers that provide video programming directly to subscribers in their service areas over video dialtone facilities.

I. THE FCC MAY NOT ACCOMPLISH THROUGH REGULATION WHAT THE CONSTITUTION DOES NOT PERMIT THROUGH LEGISLATION.

Two United States Courts of Appeals and five District Courts have found that Section 533(b) of the Cable Act,[2] the cable - telco cross ownership ban, violates the First Amendment rights of telephone companies. The statute which expressly prohibited local exchange carriers ("LECs") from engaging in speech over their facilities within their service areas indisputably burdens the LECs' First Amendment rights. In light of these decisions, the Commission properly concludes that telcos should be permitted to provide their own video programming ("affiliated programming") over their video dialtone facilities.[3]

In its examination of regulation appropriate to affiliated programming, however, the Commission appears to contemplate regulation that would once again unreasonably interfere with LECs' First Amendment freedoms by restricting a LEC's ability to promote its viewpoint in ways that are available to non-LECs. For

---

[2] 47 U.S.C. 533(b).

[3] Fourth NPRM, para. 10.

example, without explaining any legal basis for the limitations raised, the Commission inquires about prohibiting LECs from offering franchised cable service within their service areas and limiting LECs to providing video programming only over a video dialtone platform (thereby forcing LECs to provide video dialtone if they wish to speak at all.).[4] These proposals suffer from the same constitutional defect as the cross-ownership ban.

The courts are clear in their analyses. Any regulation that places special burdens on LECs' First Amendment rights must pass the test of an intermediate level of scrutiny -- that is, the Commission must be able to justify the special burdens imposed by such regulation as being no greater than is essential to accomplish a significant government interest.[5] The Commission must show that the special burden furthers a substantial government's interest. The Commission must also show that the harms to be avoided are real, not merely conjectural and that the regulation will alleviate harms in a direct and material way.

A substantial record has been amassed in the video related proceedings that support the Commission's initial conclusions that the risk of anticompetitive conduct as a result of the direct provision of video programming is attenuated by the enormous growth of the cable industry.[6] Moreover, the Commission admits that because the LECs will be a new players in the video

---

[4] Fourth NPRM, paras. 14-15.

[5] Turner Broadcasting System, Inc., v. FCC, 114 Sup. Ct. 2445, 2469 (1994), quoting U.S. v. O'Brien, 391 U.S. 367, 377, 20 L.Ed.2d 672, 88 S. Ct. 1673 (1968).

[6] Second Report and Order, para. 265.

programming market and they will be starting from zero marketshare, there is little threat that LECs could preemptively eliminate competition and monopolize the market for video programming.[7] Without the most exacting record and analytic support, there is significant doubt that regulations adopting the major limitations raised in the Fourth NPRM would meet the level of scrutiny required to pass Constitutional muster.

II. THE VIDEO DIALTONE MODEL CLEARLY ACCOMMODATES PROGRAMMING BY VIDEO DIALTONE PROVIDERS.

A. A LEC's Provision Of Programming On Its Video Dialtone System Does Not Change A Common Carrier System Into A Cable System.

Two essential characteristics of the video dialtone model distinguish video dialtone from traditional cable service: access to multiple providers and nondiscriminatory access -- the principles of common carriage. As long as the video dialtone model requires common carriage, a video dialtone system will not be transmuted into a cable system by the provision of affiliated programming; nor will the use of tariffed transport service for programming convert an affiliated video dialtone provider into a cable operator.

The traditional cable model governed by Title VI is antithetical to a common carrier video dialtone model. This is evident by the specific exclusion of cable operators from regulation as common carriers found in the Cable Act.[8] This

---

[7] First Report and Order, paras. 136-138.

[8] 47 U.S.C. §541(C).

exclusion contrasts with the express requirement for common carriage in the video dialtone model. The open, multiple access video dialtone model does not allow one provider to control all of the programming delivered over the video dialtone system, an element critical to the definition of a cable operator.[9] The ability of a LEC to provide some programming does not equate to a cable operator's ability to control programming nor does it alter the open, multiple access nature of the video dialtone model.[10]

B. Title VI Should Not Apply To A Common Carriage Video Dialtone Model.

The Commission properly concluded that a LEC's provision of a common carrier platform is not subject to Title VI of the Communication's Act.[11] The provision of content should not change that correct conclusion.

Subjecting video dialtone providers to regulation under the Cable Act should be rejected for several reasons. First, Title VI only applies to cable operators and cable systems. Given the differences between the cable model and the open

---

[9] The Committee on Energy and Commerce Report noted that §613b prohibits a common carriage from selecting or providing the video programming to be offered over a cable system. HR. Rep. No. 934, 98th Cong. 2d Sess. 57, 1984. (emphasis added.)

[10] On the other hand, total control of programming and the delivery system by a sole provider would emulate the cable model. For that reason, LECs providing cable service pursuant to a rural waiver or providing services outside of their franchise exchange areas were subject to Title VI regulation, not Title II.

[11] Fourth NPRM, para. 14.

access video dialtone model, a LEC that provides a common carriage video dialtone platform and affiliated programming cannot be a cable operator. Imposing regulations developed for the closed cable model on the open, multiple access video dialtone model will require careful and thorough justification. The Commission has previously rejected attempts to apply Title VI rules to other video service providers where it believed that non-cable providers lacked the market power to impede competition as could cable operators. LECs are nondominant as video programmers and, as such, should be not be subject to regulation meant to curb anticompetitive behavior by dominant video providers. Moreover, the Cable Act of 1992 and the Commission's regulations implementing the new statuatory provisions, were a Response by Congress to bad acts by cable operators.[12] There is no evidence to support need for remedial regulation for LECs in providing video dialtone services, including affiliated programming.

Moreover, some Title VI rules are unnecessary in the video dialtone context. For example, rules on mandatory access for cable programmers are irrelevant given the open, common carriage nature of video dialtone. In other instances, the Commission recognized that regulating video dialtone as a cable system would be duplicative because common carrier regulation addresses some of the same concerns as Title VI.[13] For example, common carrier regulation

---

[12] H. Rep. No. 628, 102d Cong., (June 29, 1992); 138 Cong. Rec. S16652 (October 5, 1992).

[13] Fourth NPRM, para. 15.

"incorporates the same concerns about public safety and convenience and use of public rights of way that provide a key justification for the cable franchise requirement."[14] Similarly, Title VI rate regulations should not apply to video dialtone offerings. First, because Title VI rate regulation rules only apply to cable offerings in the absence of competition, the offering of video dialtone in a cable operator's franchised area will likely eliminate the requirement of rate regulation for the cable operator. In that case, regulating only the rates of video dialtone services would be inequitable. Moreover, rates for video programming offered via video dialtone will be set by the individual video programmers (including any affiliated programmers) and not by the LEC. Because video dialtone programming will compete with incumbent cable offerings, video programmers have an incentive to keep their rates low. Tariffed transport rates, which will likely be part of a video programmer's charge, will be developed following common carrier rate regulations. Those regulations address the same concerns as the cable rate regulations -- assuring just and reasonable rates for service. Thus, applying Title VI rate regulation rules to video dialtone would be redundant and unnecessary.

The Commission has not proposed applying Title VI regulation to customer-programmers who provide programming via the video dialtone system. We do not suggest that the Commission should do so. However, it is not obvious what logic would justify applying Title VI regulation to only LECs or their

---

[14] NCTA v. FCC, 33 F3d 66, 73 citing Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd. 5069, 5072 (1992).

programming affiliates and not to non-affiliated programmers who deliver their programming via the video dialtone network.

Finally, the imposition of Title VI to video dialtone would unreasonably burden the provision of video dialtone. The double burden of both Title II common carriage and Title VI regulation would place video dialtone services at a severe competitive disadvantage and contribute significantly to extending the monopoly of incumbent cable operators. That kind of competitive disadvantage would cause us to reevaluate our business plans with regards to entering the video business. Moreover, if Title VI regulation is imposed on the limited services which are within the Commission's jurisdiction, carriers will have little incentive to operate pursuant to the video dialtone model. Instead, carriers may reconsider providing services under the channel service model. In that event, the actualization of the Commission's video dialtone goals would be impaired.

III. THE PROVISION OF PROGRAMMING SHOULD BE TREATED LIKE ANY OTHER NONREGULATED OR ENHANCED SERVICE.

The Commission concluded that the common carriage structure of video dialtone and the existing competitive safeguards would protect against the

risk of anticompetitive conduct.[15] The Commission also concluded that existing safeguards with respect to nonregulated services are sufficient to protect against cross subsidy concerns.[16] For purposes of the Commission's regulation, a carrier's provision of affiliated programming should be treated no differently than any other nonregulated service.[17] The provision of content by a LEC should not raise new or additional concerns about cross-subsidy. The Commission has stated that the danger of cross subsidy would be greatest in regards to transport,[18] which are well protected against by the existing competitive safeguards. In the provision of content, LECs do not have market power, but would be new entrants. The provision of affiliated programming is no different than the provision any of other nonregulated service and should be treated as such. The only arguable difference between the provision of content and other nonregulated service that may be undertaken by a BOC is the speculative concern that analog capacity will be

---

[15] Second Report and Order, para. 89. These safeguards include accounting and cost allocation rules to separate the costs of nonregulated services from the costs of regulated services; network disclosure rules that ensure that information needed by nonaffiliated providers/vendors to utilize the network are available; CPNI rules that protect the privacy interest of consumers but permit efficiencies of integration and promote competition; and Open Network Architecture (ONA) requirements to ensure accessibility to nonaffiliated providers. The Commission has begun a rulemaking in response to the Ninth Circuit Court of Appeal's remand of ONA rules governing the provision of enhanced services. In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Notice of Proposed Rulemaking, CC Docket No. 95-20, released February 21, 1995, adopted February 7, 1995.

[16] Second Report and Order, para. 92.

[17] Video services are nonregulated. First Report and Order, para. 28.

[18] U.S. West Inc., et al v. U.S.A. and FCC, 1994 U.S. App. Lexis 39121, at *36 (9th Cir., Dec. 30, 1994, filed).

exhausted. In that event, affiliated programming could reduce the capacity available for nonaffiliated programming at least pending network expansion.[19] This, however, does not argue for changes in existing safeguards except for a limitation on the extent of affiliated programming that can be carried by a carrier's basic platform.

A. Joint Marketing

The provision of content by a LEC or its affiliate does not change the balance of the public interest that lead the Commission to permit joint marketing of basic telephony and video dialtone services and of basic and enhanced video services. Providing content is simply another nonregulated information service. A LEC should be able to offer customers all of its services as long as applicable safeguards are observed.

The joint marketing rules have worked well to accomplish the Commission's objectives. There is no evidence of any increase or even risk of anticompetitive behavior as a result of the joint marketing of basic and enhanced telephony services. On the other hand, consumers have benefited from the ease of obtaining additional services, resulting in greater promotion of new services.[20]

---

[19] Digital broadcast service is an alternative to analog broadcast if capacity becomes an issue.

[20] Permitting joint marketing will also equalize video service providers with cable operators who will jointly market telephony and video services.

The kinds of joint marketing that a LEC might undertake may differ according to its business organization and structure. Among the Pacific Companies, Pacific Telesis Video Services (PTVS), a nonregulated affiliate, may provide content when consistent with the law. PTVS may do so as a customer-programmer on Pacific Bell's Level 1 transport platform and/or as a Level 2 enhanced service provider. Whether the joint marketing arrangement for the provision of content is with an affiliate or with an integrated service group, the significant benefits of joint marketing found by the Commission continues to outweigh any speculative risk of anticompetitive behavior.

In recently authorizing a six-month video dialtone market trial for Bell Atlantic, the Commission adopted several interim safeguards related to the provision of content by a Bell affiliate.[21] The Fourth NPRM asks if the interim safeguards should be adopted as permanent requirements for all LECs that provide video programming over their own video dialtone platform.[22]

We do not object to a permanent requirement that marketing, promotional or sales referral services provided by a carrier to an affiliate must be offered to other video programmers using the Level 1 platform.[23] Similarly, we would agree to provide copies of marketing material on video dialtone program offerings to the Commission.

---

[21] Application of the Chesapeake and Potomac Telephone Company of Virginia, W-P-C 6834, Order and Authorization, January 20, 1995, para. 22.

[22] Fourth NPRM, para. 30.

[23] Fourth NPRM, para. 30.

B. CPNI Rules

The Commission affirmed the application of existing Customer Proprietary Network Information (CPNI) rules to video dialtone services. Those CPNI rules should also apply when a BOC provides video programming directly to a subscriber.

A BOC's provision of content does not change the balance of interests supported by the CPNI rules. The balancing of goals which resulted in the CPNI rules are equally applicable to basic and nonregulated video services as they were to telephony services.[24] Moreover, there is no reason to change the existing definition of CPNI because of a BOC's ability to provide content. The provision of content by a BOC will be a nonregulated service. Information obtained about nonregulated enhanced services, which are not part of the network offering, is not CPNI.[25]

---

[24] The Commission balanced its goals of protecting customers' privacy interest against disclosure of their CPNI by BOC personnel (privacy interest); of increasing customer access to enhanced services by permitting a BOC to market telephony and enhanced services at the same time and of using CPNI to assist in identifying customer interests and needs (efficiency); and of preventing a BOC from gaining a competitive advantage over independent enhanced service providers because a BOCs would have information to use to market enhanced services to customers (competitive equity).

[25] CPNI must be clearly distinguished from information that is independently obtained in the provision of enhanced or nonregulated services. Thus, information on customers (who may be either video programmers who purchase nonregulate marketing services or end users who are the video programmers' customers) obtained outside of the provision of basic video services is not CPNI and are not subject to the CPNI rules. Filing and Review of Open Network Architecture Plans, 4 FCC Rcd. 1, at 215-216 (1988).

We believe that speculative concerns about competitive equity are over-emphasized.[26] First, the customer-specific CPNI that Pacific Bell will have is very limited.[27] Secondly, as the Commission previously recognized, the most valuable information in marketing enhanced services, which may also be said for video services, will come directly from the customers and is available to both other video programmers and BOCs.[28] Third, the marketing value of the limited amount of customer-specific CPNI is also insignificant.

As the Commission further recognized, the value of CPNI is that Pacific Bell's integrated service representatives may offer their customers the full range of video and telephony services on the same calls. This will increase consumers' access to competitive video dialtone services as well as permit BOCs to provide services more efficiently. These efficiencies are accomplished whether or not the BOC provides content.[29]

---

[26] See Pacific Bell Description of CPNI, Letter to William F. Caton from Alan Ciamporcero, March 13, 1995.

[27] PTVS will act as a Level 2 gateway provider and may provide content on either the Level 1 platform or Level 2 gateway. PTVS may also provide optional services to video programmers who use Pacific Bell's Level 1 platform and may obtain end-user information while acting in any of these capacities. The information obtained by PTVS is not CPNI. In addition, when PTVS acts as the agent of a video programmer, PTVS will have information about the programmer who also purchases transport on Pacific Bell's Level 1 platform. The information obtained by PTVS is not CPNI.

[28] Reconsideration Order, paras. 240-241.

[29] If, however, CPNI rules preclude access by a BOC's integrated sales representative, cable operators should also be precluded from access to its cable customer service information when they sell telephony services.

C. Privacy

The Commission previously determined that a customer's privacy interests in the services and programming carried by video dialtone transport was not harmed when LECs provided only transport services and someone else selected the programming.[30] A LEC's ability to select programming does not raise new concerns about consumer privacy.

In fact, the change in information available to a LEC is very limited. The only new information a LEC will gain as a result of its provision of content will be about those end-users who specifically elect to purchase the LEC's programming. And, we are very much aware of their concerns about the information that companies have and how that information is used.

Privacy concerns about content exists for other telecommunications services as well but the Commission has not regulated those providers. For example, providers of telephony enhanced services (ESPs) may have specific information about their subscribers as a result of that customer relationship. ESPs are not subject to any specific Commission privacy requirements. Nonaffiliated video programmers will also have specific information about their customers' choices. Those video programmers are not subject to specific Commission privacy regulations.

---

[30] Reconsideration Order, para. 243.

As for the privacy concerns of those who are not our programming customers but who are provided programming selected by others via the video dialtone system, they will not be affected by our ability to provide programming. Pacific Bell will not have any additional information about the content of other video programmers or of their end users who receive video dialtone services. As a transport provider, Pacific Bell will not collect information on viewing. Pacific Bell will have some end-user information in order to provide customer-programmers access to their customers. That information will include equipment identification information about customer premises equipment (such as interdiction devices and set top boxes), the location of interdiction devices for maintenance and service purposes, the channels that the customer-programmer authorizes to be made available for a specific device and the customer-programmer's short description of its programming submitted for listing on the Level 1 directory. Pacific Bell will not have access to information on the types of programming each customer views. We cannot determine what broadcast programming an end user actually watches; we would at most only be able to determine what channels the end-user is authorized to receive. Moreover, in order to determine the type of programming the end-user is authorized to receive, extensive system development would be required before we could correlate service location identification and channel authorization with publicly available customer-programmer content information which would then have to be matched to a specific end-user.[31] While Pacific Bell may be able

[31] Pacific Bell will not know a programmer's content unless the programmer provides that information or makes it known publicly.

theoretically to correlate the information it has in order to determine the type of broadcast programming the end-user is authorized to receive, we have no plans to undertake the substantial effort required to do so. Less costly non-CPNI alternatives are available to obtain valuable demographic information of significant marketing value. For specific event authorization (such as pay per view or transactional services), Pacific Bell will not retain the authorization records except for information necessary for network management and service verification.

Consumer do not generally object to a company using its customer information to market additional products to them. To the contrary, we believe that customers expect to be able to obtain information on all products offered by a company. It will be no different for video dialtone services. Customer privacy concerns largely have to do with the disclosure of customer information to third parties and that appears to be a primary concern raised by the inquiry in this proceeding. As we've explained, that concern is largely hypothetical because of the limited amount of information that a BOC will possess as a result of providing the basic video dialtone platform.

Nonetheless, given consumers' concerns, it would not be good business to risk the loss of customers by acting in ways that would offend their sense of privacy. The policies of the Pacific Companies are designed to protect customer information and comply with existing federal and state laws. For example, PTVS will notify consumers of its policies when they sign up for video dialtone services, repeat that notice annually and honor written notices from consumers indicating

make aggregate information available to other programmers and advertisers, specific customer information will not be identifiable from aggregate data.

D. Accounting Safeguards

The provision of content by a LEC will be a nonregulated service. The existing accounting safeguards rule which require the separation of fully distributed nonregulated costs from regulated costs will protect against cross subsidy by the provision of content. Similarly, the affiliate transaction rules which govern interactions between a carrier and its nonregulated affiliates will apply to an affiliate's provision of programming via the video dialtone system. Those rules require the affiliate to pay tariffed rates for tariffed service just as required of any nonaffiliated recipient of tariffed service.

The Commission also asks if the safeguards would apply if the LEC owned five percent or more of a video programmer.[32] They should not. The five percent standard, developed pursuant to the now unenforceable cross ownership ban, simply indicated a telco's cognizeable financial interest in a video programmer. The Commission deemed any cognizeable interest to be affiliation. The traditional definition of affiliate established by both the cross ownership statute and by the Commission's Part 32 rules, however, requires control.[33] Control

---

[32] Fourth NPRM, para. 19.

[33] Affiliated companies means companies that directly or indirectly through one or more intermediaries, control or are controlled by, or are under common control with, the accounting company. 47 C.F.R. 32.9000.

is the proper measure of affiliation. The rigid 5% ownership standard should not be retained. The difference in definitions is unnecessary and will merely create confusion that will require Commission resources to resolve. The Commission should make clear that the definition of affiliated companies provided by Section 32.9000 of its rules applies to video programmers in the application of the Accounting Safeguards.

E. Network Disclosure

A carrier's decision to provide content over its video dialtone system will not impact the network disclosure rules. Because affiliated programming will not affect the equipment or technology of the basic platform, network disclosure rules do not require revision. Carriers will continue to be required to provide sufficient notice to permit equipment manufacturers and vendors to respond to changes.

IV. AFFILIATE PROGRAMMING SHOULD NOT BE LIMITED.

The Commission inquires as to whether the percentage of affiliated programming should be limited.[34] The principle of common carriage should apply to permit any programmer nondiscriminatory access to video dialtone facilities. As long as rigorous common carriage principles are followed, it is arbitrary to limit the extent of capacity for programming based on an affiliation with the basic platform

---

[34] Fourth NPRM, para. 21.

provider.[35] The Commission's current rules reinforce video dialtone common carriage principles. For example, a carrier must expand its video dialtone capacity to offer sufficient capacity to serve multiple video programmers. LECs are required to expand whenever, and to the extent that, expansion is technically feasible and economically reasonable.[36] Similarly, no programmer may have all or significantly all of the analog capacity of a video dialtone system.[37] The Commission can further support the common carrier principle, and in doing so ensure its goals of increased competition and diversity of viewpoint, by limiting the number of analog channels available to multiple system operators (MSOs) on video dialtone systems in their franchised areas. This would also prevent cable operators from avoiding improvements to their plant and using video dialtone facilities as a substitute for their own plant development, thus supporting the Commission's intent to promote infrastructure development.

If the Commission believes further qualification of affiliated programming is necessary, limitations should only apply if there is unmet demand. To the extent that supply exceeds demand, limits would be unnecessary and

---

[35] A LEC's provision of affiliated programming will have the same benefits of fostering investment in programming services and the efficiencies of integration that the Commission acknowledged in examining the extent of permissible channel occupancy by cable operators' affiliated programming. Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, MM Dkt. No. 92-294, 8 FCC Rcd 8565 (1994), para. 68, n.88.

[36] Reconsideration Order, paras. 33-38.

[37] Id., para. 35.